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Supreme Court of the United States

OCTOBER TERM, 1961.

No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation,
Petitioner,

against

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS and MARCELLE KREISCHER,
Respondents.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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Respondents.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

THE GLIDDEN COMPANY, petitioner, respectfully moves this Court for leave to file the annexed petition for rehearing of the order of this Court entered on October 9, 1961, 368 U. S. 814, insofar as it denied the petition for certiorari.

Rehearing is sought, as pointed out in the annexed petition, because

1. On March 5, 1962, this Court handed down its decision in *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95, clearly establishing that the law applicable to the collective bargaining agreement involved in this case is federal substantive law in lieu of the local substantive law applied by the Court of Appeals in making its decision. See *Glidden Co.* v. *Zdanok*, 82 S. Ct. 1459, 1466 (1962). Such legal error in an area involving questions of widespread importance in the development

of a uniform federal labor law should be reviewed by this Court in the light of *Lucas*.

2. On July 16, 1962, the Court of Appeals for the Sixth Circuit in *Oddie* v. *Ross Gear and Tool Co.* handed down its opinion reversing the District Court of the Eastern District of Michigan which adhered to the ruling of the Second Circuit in *Glidden* and presenting a disagreement and conflict in the interpretation of collective bargaining agreements, between the Second Circuit and the Sixth Circuit which should be resolved by this Court.

Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 58(2), the grounds upon which it is based arose after such time; and the Court has the power, in its discretion, to entertain the petition, *Roberts Sash & Door Co.* v. *United States*, 282 U. S. 829-30 (1930); *Duquesne Steel Foundry Co.* v. *Burnett*, 282 U. S. 830 (1930); *Douglas* v. *Willcuts*, 295 U. S. 722 (1935); *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 474 (1947); *Phillips Petroleum Co.* v. *Wisconsin*, 346 U. S. 934-35 (1954). And see *Bradley Mining Co.* v. *Boice*, 345 U. S. 932 (1953).

Dated: New York, New York
July 25, 1962

Respectfully submitted,

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Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1961

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OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS and MARGELLE KREISCHER,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner, The Glidden Company, prays that this Court grant rehearing of its order of October 9, 1961, 368 U. S. 814. This order granted petitioner's petition filed with this Court July 21, 1961, limited to the question:

> "(d). Does participation by a Court of Claims judge vitiate the judgment of the Court of Appeals?",

a question involving the jurisdiction of the Court of Appeals for the Second Circuit in making its judgment herein.

Said order denied petitioner's writ of certiorari in all other respects.[1] The other questions presented by petitioner were:

[1] See *Lamar* v. *United States*, 241 U. S. 103, 110 (1916), relating to the general rule of this Court, that when this Court reverses a decision of the Court of Appeals wholly on the question of its jurisdiction, this Court remands the case to that court without passing on the merits, but that this Court has the power to, and, in exceptional cases, may determine the merits.

"(a) Are seniority rights in a given bargaining unit, arising under a collective bargaining agreement applicable to a specific plant which has been closed, transferable to another plant in the absence of language in the agreement expressing an intent that they should be so transferable?

(b) Do seniority rights and obligations under a collective bargaining agreement between an employer and a collective bargaining agent of its employees continue to exist after the employment has been duly terminated in good faith?

(c) Do seniority rights and obligations under a collective bargaining agreement between an employer and a collective bargaining agent of its employees continue to exist after that agreement has been duly terminated in good faith?"

On June 25, 1962, this Court, under the limited writ of certiorari, affirmed the judgment of the Second Circuit. *Glidden Co.* v. *Zdanok*, 82 S. Ct. 1459 (1962).

Reasons for Granting Rehearing and Issuing the Writ.

1. At the time of this Court's order of October 9, 1961, there existed no clear holding determining whether state or federal law was properly applicable in those suits involving the interpretation of collective bargaining agreements that were not brought under section 301 of the LMRA.

On March 5, 1962, this Court in *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95, held that federal substantive law, in lieu of local substantive law, is properly applicable in suits involving the interpretation of collective bargaining agreements brought in state courts (or in federal courts on diversity jurisdiction) by employers or unions.

Federal substantive law must be applicable to suits brought by individual employees for any other result would create the "disruptive influence" created by "the possibility that individual contract terms might have different meanings under state and federal law", 369 U. S. 95, 98.

As Professor Archibold Cox put it:

> "It would create hopeless confusion to have one rule applicable to suits by a labor organization and another to suits by individuals. Uniformity could be achieved under a body of federal substantive law only by holding that the rules of decision developed by the federal courts were binding on state tribunals."[2]

Mr. Justice HARLAN, in his opinion of June 25, 1962, in this case, noted that the majority of the Court of Appeals decided the case as a matter of New York law. 82 S. Ct. 1459, 1466. He stated:

> "The Court of Appeals for the Second Circuit sat to determine a question of state contract law presented for its decision solely by reason of the diverse citizenship of the litigants."[3]

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[2] Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297, 1339 (1954). *Accord*, Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N. Y. U. L. Rev. 362, 373 (1962).

In an article by Professor Benjamin Aaron, entitled "Reflections on the Legal Nature and Enforceability of Seniority Rights", appearing in the Harvard Law Review for June, 1962, (Volume 75, No. 8) commencing page 1532, there is an illuminating discussion (page 1542, *et seq.*) of *Zdanok* v. *Glidden*, 288 F. 2d 99 (1961), supporting the statement made by Professor Cox, pages 1551-2, note 69.

[3] One of the major arguments made by respondents in opposition to the granting of the petition was that *Glidden* involved an interpretation of state law, contrary to the contention of petitioner. See brief of respondents in opposition to petition, at page 9.

In a footnote 8 to this sentence Mr. Justice HARLAN stated:

> "Under our limited right of certiorari, 368 U. S. 814, we have no occasion to consider whether federal law is more appropriately the measure of the employer's obligation. Cf., *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95."

Before *Lucas*, *Glidden* appeared to be merely a disagreement between the District Court and the Court of Appeals as to the proper interpretation of New York law, a type of case in which this Court has often expressed its extreme reluctance to "set its view of [state] law against that of the Court of Appeals," *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 209 (1956).

The majority in *Glidden* (Chief Judge Lumbard dissenting), sitting "to determine a question of state contract law", ignored applicable federal law reflected in the decisions of the Courts of Appeal in the Fifth, Sixth, Seventh and Tenth Circuits in the cases cited on page 5 hereof. The rulings in these cases are in conflict with *Glidden* as to the nature and scope of seniority rights.

Lucas makes it clear that *Glidden* involves a question of federal substantive law and should *not* have been decided by the Court of Appeals on the basis of an interpretation of New York law.

There are now grounds which have arisen after the denial on October 9, 1961, 368 U. S. 814, of the writ of certiorari, which warrant a rehearing of *Glidden* involving federal substantive labor law questions, as yet unsettled by this Court, exceedingly important to hundreds of com-

panies contemplating plant movement and to thousands of their employees.[4]

2. Leaving the decision of the Second Circuit unreviewed would seem to be justified only if federal law is, or should be, substantially the same as New York law as interpreted by the majority of the Court of Appeals. However, Chief Judge Lumbard, recognizing that federal law was applicable, felt himself compelled to agree with the district court and to dissent from the majority's holding.

The ruling of *Glidden* is clearly inconsistent with the rulings made by other federal circuit courts which considered the nature and scope of seniority rights and held that such rights do not survive the expiration of the agreement creating them or the termination of the relationship of employer and employee and are subject to alteration or destruction by the collective bargaining agent. *Local Lodge 2040 International Association of Machinists* v. *Servel*, 268 F. 2d 692, 697 (C. A. 7th Cir. 1959), *cert. denied*, 361 U. S. 884 (1960); *System Federation No. 59 of Ry. Employees* v. *La. A. Ry. Co.*, 119 F. 2d 509, 515 (C. A. 5th Cir. 1951) *cert. denied*, 314 U. S. 656 (1941); *Elder* v. *New York Central R. R. Co.*, 152 F. 2d 361, 364 (C. A. 6th Cir. 1945); *Sheils* v. *Baltimore & Ohio R. R.*, 154 F. Supp. 917 (S. D. Indiana, Indianapolis Division 1957), page 925, aff'd 254 F. 2d 863 (C. A. 7th Cir. 1958); *McMullans* v. *Kansas, Oklahoma & Gulf Ry. Co.*, 229 F. 2d 50, 53 (C. A. 10th Cir. 1956).[5]

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[4] See, *e. g.*, the list of *amici* reported at 368 U. S. 814.

Glidden itself is defendant in a suit commenced on June 27, 1962 in the United States District Court for the Southern District of New York by 155 other former employees. See, *Alexander* v. *Glidden*, Civil Action No. 62-2244. These 155 plaintiffs are plaintiffs in earlier suits in the New York Supreme Court, New York County, i. e., Alexander *et al.*; Balch, *et al.*, and Hackett in which Glidden, as defendant, has answered.

[5] See, "Termination of Colleetive Bargaining Agreements—Survival of Earned Rights", 54 Northwestern L. Rev. 646, 649, 651 (Nov.-Dec. 1959).

In *Trailmobile Co.* v. *Whirls*, 331 U. S. 40 (1947), in a footnote by Mr. Justice Rutledge, at page 53 of the opinion of the Court it is stated:

> "Seniority arises out of contract or statute. An employee has 'no inherent right to seniority in service'."[6]

In *Oddie* v. *Ross Gear and Tool Co.*, Chief Judge Miller in an opinion handed down on July 16, 1962 reversed the district court (195 F. Supp. 826, E. D. Mich. 1961).[7] In this opinion Chief Judge Miller stated (appendix, a-11):

> "Nor do we think there is merit in the contention that plaintiffs' seniority rights at the Detroit plant are 'vested' rights which cannot be cut off or defeated by the relocation of the plant in Tennessee."

He cited with approval *Servel, System Federation No. 59* and *Elder* in support of his statement. However, he pointed out (appendix, a-12):

> "Whether such [seniority] rights continue in existence beyond the end of the current bargaining agreement is another question, which we are not now con-

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[6] "In the absence of specific language in the collective agreement to the contrary, however, the rule has always been—as stated in the leading case of *System Fed'n 59* v. *Louisiana & Ark. Ry.*—that with reference to seniority, 'collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract beyond its life, when it has been terminated in accordance with its provisions.' Similarly, in *Local Lodge 2040, Int'l Ass'n of Machinists* v. *Servel, Inc.*, the court declared that 'seniority rights depend upon an employer-employee relationship; they do not guarantee such a relationship but merely define the rights of an employee when that status is in existence. . . .'" Aaron, *Reflections on the Legal Nature and Enforcibility of Seniority Rights*, 75 Har. L. Rev. 1532, 1542 (June 1962).

[7] A copy of the opinion is annexed in the appendix for the convenience of the Court.

sidering. Clearly, the word 'vested' is not the correct word to describe these rights, in that there are a number of ways in which such rights may be terminated or lost."

In *Glidden* the collective bargaining agreement provided

"ARTICLE I *Recognition*

"1. *The Company recognizes the union as the exclusive representatives* of all hourly paid production, maintenance and service *employees of the Company at the plant facilities named above* for the purpose of collective bargaining with respect to rates of pay, hours of employment, fringe benefits, and other terms and conditions of employment." (Emphasis added.)

In the preamble to this agreement it was stated that the agreement was made by Glidden

"for and on behalf of its [the Glidden Company] plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York."

The *Ross* collective bargaining agreement provided

"*Recognition*

"1. *The Company recognizes the union as the exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit* for the purpose of collective bargaining on matters of wages, hours and conditions of employment, excluding those mentioned in the next succeeding paragraph." (Emphasis added.)

In *Glidden*, the majority (Chief Judge Lumbard dissenting), ignoring the provisions of Article I(1) but refer-

ring only to the preamble in the *Glidden* agreement, concluded that the agreement was not limited geographically to Elmhurst, Long Island, as provided in Article I(1) and in the preamble thereof.

Chief Judge Miller concluded that Article I(1) in the *Ross* agreement was limited geographically to the plants "located within the city limits of Detroit."[8]

The provisions contained in the *Glidden* and *Ross* agreements with respect to geographical application, it is clear, are basically the same.

It is clear that there is conflict between the Second and Sixth Circuit Courts of Appeals in the interpretation of these basically identical clauses in collective bargaining agreements which have arisen since the denial of the petition for certiorari by this Court on October 9, 1961. "The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling." *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95, 104.

Theories of property rights and principles of contract interpretation that permit employees whose seniority rights were created at one plant by one union to enforce those

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[8] The district judge in *Ross* held that seniority rights were "vested" (195 F. Supp. 826, 828) and that the agreement contained no effective geographic limitation (*Id.* 829-31) citing only the Court of Appeals opinion in *Glidden*. On the other hand, the district judge in *Glidden* held that the agreement contained an effective geographic limitation (185 F. Supp. 441, 448-49, as did Chief Judge Lombard, 288 F. 2d 99, 105).

Differing interpretations concerning the nature and scope of seniority rights as "vested" or "not vested", seems to have compelled contrary conclusions as to the geographic scope of the agreement thus indicating a basic disagreement and conflict between the Circuit Courts of Appeal as to a federal substantive law to be applied in an area where local substantive law is inapplicable if at variance with federal law. *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95.

rights, after expiration of the agreement and closing of the plant, at another plant where a different union is, or may become the exclusive bargaining agent (as happened in *Glidden*), are incompatible with a federal labor policy[9] that is suspicious of individual advantages not obtained by the appropriate collective bargaining representative. See *J. I. Case Company* v. *N. L. R. B.*, 321 U. S. 332, 337-38 (1944). "It would indeed be an anomaly if the National Labor Relations Board would hold a contract not applicable to a new plant—i.e., not a contract bar—but a court would hold the seniority rights arising under it vested and in effect", Lowden, *Survival of Seniority Rights Under Collective Agreements: Zdanok v. Glidden Co.*, 48 Va. L. Rev. 291, 296-97 (1962).

Thus, the rulings in *Glidden* and *Ross* have resulted in a conflict as to the interpretation of collective bargaining agreements and have created basic conflicts with the decisions of other circuits and with the objectives of national labor policy. "To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court." *Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962). "Because of the various views expressed as to controlling legal principles in the decisions discussing such arrangements, we granted certiorari. . . ." *Commissioner* v. *Tower*, 327 U. S. 281, 284 (1946).

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[9] See, *International Ladies Garment Workers Union* v. *National Labor Relations Board*, 366 U. S. 731 (1961).

Conclusion.

For the reasons set forth above and in the petition for certiorari, it is respectfully urged that rehearing be granted and that, upon such a rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Dated: July 25, 1962.

Respectfully submitted,

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WHITE & CASE,
Of Counsel.

Certificate of Counsel.

I hereby certify that the foregoing petition is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2) of the rules of this Court.

Dated: July 25, 1962.

CHESTER BORDEAU,
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New York 5, N. Y.

Appendix

Opinion.

No. 14712.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

JAMES ODDIE, EDWARD CWIERTNIEWICZ, JOHN PENZAK, OSCAR KING, HARRY C. BREMMER,
Plaintiffs-Appellees,

v.

ROSS GEAR AND TOOL COMPANY, INC.,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided July 16, 1962.

Before: MILLER, Chief Judge, WEICK and O'SULLIVAN, Circuit Judges.

MILLER, Chief Judge. The plaintiffs, who are citizens of the State of Michigan and are employees of the Gemmer Manufacturing Company Division of the defendant, Ross Gear and Tool Company, Inc., an Indiana corporation, are members of Local 80 of the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW (AFL-CIO), hereinafter referred to as the "Union," the bargaining representative for said employees. They filed this action in the District Court on June 15, 1961, on behalf of themselves and other employees similarly situated for a declaration of rights with respect to their seniority or recall-to-work rights under the collective bargaining agreement then in effect between the

Union and the Gemmer division of the defendant. Jurisdiction is based upon diversity of citizenship and the amount in controversy. *Section 1332(a), Title 28, United States Code. McGarry* v. *Lentz.* 9 F. (2) 680, 683, affirmed, 13 F. (2) 51, C. A. 6th, cert. denied, 273 U. S. 716.

The material facts, which are not in dispute, are as follows. The defendant is a manufacturer of steering gears, with operations in the United States, England, France, Brazil, Australia, Germany and Spain. The Gemmer Manufacturing Company was an independent corporation until 1956 when it was purchased by the Ross Gear and Tool Company. Its plant was located at Detroit, Michigan. Since 1936 the Union has represented the employees at this Detroit plant. Although there were collective bargaining contracts prior to 1948, we are here concerned with only the collective bargaining contracts of 1947, 1951, 1955 and 1958 and the negotiations in connection therewith. The current contract, hereinafter referred to more in detail, was entered into December 19, 1958, and was due to expire on October 1, 1961, several months after this action was filed.

Prior to the filing of this action, the defendant had a plant in Lafayette, Indiana, known as "Ross Gear and Tool Company, Inc.," hereinafter called the Lafayette plant, and a plant in Detroit, Michigan, known as "Gemmer Manufacturing Company, a division of Ross Gear and Tool Company, Inc.," hereinafter called the Detroit plant. The Detroit plant was located on Mt. Elliott, between Milwaukee and Harper.

On January 13, 1961, the defendant posted a notice to the employees at the Detroit plant, signed by John E. Jarrell, President, reading as follows:

"To All Our Employees:

"The Ross Gear and Tool Company has formed a new division; 'The Tennessee Division of the Ross Gear and Tool Co., Inc.'

"This division is building a plant at Lebanon, Tennessee to manufacture new products in addition to some products which are now manufactured at Lafayette and Detroit.

"The pitman arm manufacturing of both Lafayette and Detroit is being transferred to the new division.

"Economic studies are being made on the basis of present and potential business in order to determine if the manufacturing of additional products should be combined in existing divisions or transferred to the new division."

In a letter to defendant dated January 25, 1961, Ken Morris, Co-Director UAW Region 1, stated that the notice of January 13, 1961, had caused much concern on the part of the employees as it pertained to their continued job security. He wrote:

"Because it is evident that some jobs are leaving the Detroit Plant for the Lebanon Tennessee Plant, we are requesting that any employee affected because of the transfer of a job, be given an opportunity to go to Lebanon with the job.

"We feel you will agree that the long service given by an employee to the company should be allowed to continue if he is willing to follow the operation to the new company location."

He asked for a meeting at the Company's earliest convenience "to reach an understanding on the methods and principle of employees right to transfer with their jobs."

After an exchange of several letters, in which the Company took the position that there was no need for a meeting and that it might be more appropriate to hold such a meeting after the Company had completed certain studies, Morris wrote on February 22, 1961, that if he did not hear from the Company in the next forty-eight hours indicating a willingness to arrange a meeting, the Union would file

immediate complaint with the National Labor Relations Board, plus taking such other legal steps necessary to require the Company to bargain in good faith with the organization which represented the Company's employees. By letter of February 27, 1961, the Company agreed to the requested meeting, suggesting the date of March 8, 1961, as the date therefor.

In the meantime, on February 6, 1961, defendant posted a second notice to the employees at the Detroit plant, signed by G. Bissett, who was Vice-President of the Gemmer Division, which referred to recent newspaper and radio stories which suggested that the defendant intended to move its entire Detroit operation to Lebanon. This notice concluded with the following:

> "The economic studies referred to in the January 13 announcement are still in progress. Should these studies indicate the advisability of moving or combining the production of other products, either here or at other plants, you will be advised by Mr. Jarrell or myself."

On March 3, 1961, the defendant posted a third notice to the employees at the Detroit plant, signed by its President, which stated that the purpose of the notice was to help clarify some of the conflicting rumors which were rampant in the factory and even in the city. The notice stated that in recent years the Company had increasing difficulty in meeting competition to the point where some items were being produced at a price that was not profitable in view of the production costs, and that it was necessary that the management of the Company do everything that could be done to produce the Company's products at the lowest possible production cost; that the former Gemmer Manufacturing Company was having a very unfavorable profit experience when it was acquired by the defendant in 1956, and that while the defendant hoped that it could do

much better with Gemmer's facilities than Gemmer had done, this had not proven to be the case, with the exception of one year, and that the rapidly changing economic and competitive conditions in general and those in Gemmer's field in particular, had complicated the situation to such an extent as to make it appear that the Company would never be able to operate profitably in the Detroit plant. It also stated that many Southern states had authorized cities to subsidize the building of new manufacturing plants; that the construction of the new Tennessee plant was being subsidized by the City of Lebanon; that other advantages, such as lower taxes, lower operating costs, and the like, were also offered; that the Company planned that new products would be put in the new plant and that studies would be made to see what other items might be produced there; that the Company was in the process of completing these studies, but did not presently have definite conclusions to announce; that it was a possibility that a major portion of the items then being produced in the Detroit plant would be transferred to the Lebanon plant; and that the Company would consider all the factors carefully and would not cease operations at Detroit if it could be avoided.

The meeting between the defendant and the Union took place on March 9, 1961. At the meeting the defendant did not agree to the Union's request that any employee affected because of the transfer of the job be given the opportunity to go to Lebanon with the job and his seniority rights pertaining thereto. The defendant took the position that employees whose jobs were eliminated would be treated the same as other employees in the past had been treated in job elimination situations, that is, they would be given the rights provided for them in the seniority provisions of the current contract between the Company and the Union; that these employees, consistent with their seniority rights, would be retained at work in the Detroit plant; that the Company did not plan to offer reemployment at the Tennessee Division to the employees whose jobs at the

Detroit plant were eliminated, and that in the event employees were laid off as a result of the transfer, the laid-off employees would not be the occupants of the transferred jobs.

On May 9, 1961, Morris wrote to the Company stating that the Company was under a duty to recall at Lebanon employees laid-off in Detroit as a Federal Court of Appeals recently made clear in *Zdanok* v. *Glidden Co.*, 288 F. (2) 99, C. A. 2nd. He closed this letter by stating:

> "This is to advise you that if you persist in your present determination to breach this duty, legal action will be taken."

On May 22, 1961, the defendant posted a notice to the employees at the Detroit plant, signed by its President, which referred to the establishment of the Lebanon plant and the study which had been given to the overall picture, and advised that, in view of the fact that it had become obvious that the Detroit operation could not be expected to be a profitable one on a competitive basis, the defendant had decided, with reluctance on the part of its officials, to terminate the Detroit operation of the Gemmer Division of the Company. The notice stated that the Company expected to start the transfer of operations by July 1, 1961, and that on or about September 2, 1961, it expected to discontinue production at Detroit and commence moving the remainder of the production and maintenance equipment.

Thereafter, the plaintiffs filed their complaint in the present action, which set out the foregoing facts and took the position that the seniority rights of the defendant's Detroit employees under the 1958 collective bargaining agreement survived the transfer of defendant's Detroit operations to Lebanon, and that when defendant commenced at Lebanon its operations transferred from Detroit, it would be under a duty to honor at Lebanon the seniority rights of its Detroit employees and recall them

to work, in accordance with those rights. They also contended that these seniority rights would continue in existence and would be applicable to operations at the Lebanon plant after October 1, 1961, at which time the current collective bargaining agreement terminated. Defendant by its answer took the position that the 1958 bargaining agreement, under which the plaintiffs claimed the seniority rights in question was applicable by its express provisions only to the Detroit plant and that, accordingly, it had no application to the operations of the defendant at its plant in Lebanon, Tennessee. The Company also took the position that, even if the collective bargaining agreement was applicable to the Lebanon operations, it was only applicable until October 1, 1961, at which time the bargaining agreement terminated by its express terms.

This presents for consideration the provisions of the collective bargaining agreement which pertain to these opposing contentions. The 1958 agreement, in effect at the time, provides as follows in its opening paragraphs:

"AGREEMENT

"THIS AGREEMENT is entered into this 19th day of December, 1958, by and between GEMMER MANUFACTURING COMPANY (of Detroit, Michigan), which is a division of Ross Gear and Tool Company, Inc. (a corporation of Lafayette, Indiana), and which Gemmer is hereinafter referred to as the 'Company,' and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW (AFL-CIO), and LOCAL 80, THEREOF, hereinafter referred to as the 'Union.'

"WHEREAS, the parties to this agreement desire to promote the spirit of harmony and cooperation between them and insure the most efficient operation of the Company's plant, the following agreement is entered into:

Opinion.

"RECOGNITION

"1. The Company recognizes the Union as the exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit for the purpose of collective bargaining on matters of wages, hours and conditions of employment, excluding those mentioned in the next succeeding paragraph."

There is no dispute between the parties that paragraphs 17-40 of the agreement, under the heading of "Seniority" give certain seniority and recall-to-work rights to the plaintiffs and other employees of the Gemmer Company in the Company's operation of the Detroit plant. What is presented for decision is whether these seniority and recall-to-work rights are applicable to the defendant's operation of its plant at Lebanon, Tennessee, and, if so, whether they ceased to exist or expired with the expiration of the collective bargaining agreement on October 1, 1961.

The District Judge rendered an opinion on July 5, 1961, which is reported at 195 F. Supp. 826, in which he held that the 1958 collective bargaining agreement granted employees certain benefits and rights that became "vested" in the sense that they could not be unilaterally denied without their consent or other agreed means, such as the right to discharge; that these rights extended beyond the time limitations of the collective bargaining agreement; that these rights applied to a "plant" regardless of physical location under the contract and previous contracts; and that these rights included, among other things, seniority rights for the purpose of rehiring after layoff (which could go beyond an anniversary date) as provided in the agreement. The District Judge said that he felt bound by the ruling and reasoning of the *Glidden* case, *supra*, which was the case referred to in the Union's letter of May 9, 1961,

and the contract being not to the contrary, the defendant had an obligation and duty to rehire on the basis of seniority those employees laid off in Detroit when that plant's operations were removed to Lebanon, Tennessee. An order declaring the rights of the parties in accordance with the views expressed in the opinion was entered July 7, 1961, from which this appeal was taken by the defendant.

Plaintiffs, in support of the judgment, rely strongly upon the ruling of the Court of Appeals for the Second Circuit in *Zdanok* v. *Glidden Co., supra,* 288 F. (2) 99, and the reasoning of the District Judge in the present case, particularly the statement in his opinion that "The Gemmer Division plant is the same plant wherever it is moved, in spite of the fact it might be known by a different name. Mere change of form will not change the substance, nor will mere change of location. This is the same plant, same machinery and equipment, same operation, same officers and supervisors, but in a new climate." They urge upon us that it would be unreasonable under such circumstances to have the agreement applicable to the plant while operating in Detroit and to hold that it is not applicable to the same plant merely because it has been moved to Tennessee.

Defendant relies upon the express wording of the agreement, which it contends specifically provides that the agreement is applicable only to a plant located within the city limits of Detroit; that there are good and valid reasons for restricting the application of the agreement to its plants within the city limits of Detroit, but, irrespective of that, in the absence of the restriction being contrary to public policy, it is of no concern to the Court whether the restriction is reasonable or unreasonable when the parties have expressly contracted for that result.

The collective bargaining agreement provides that the Company recognize the Union as the exclusive representative "of its employees in its plant or plants which are located in that portion of the greater Detroit area which is

located within the city limits of Detroit for the purposes of collective bargaining. . . ." This is plain, unambiguous language. The agreement gave seniority and recall-to-work rights to employees in the defendant's plants which were within the city limits of Detroit. It gave no such rights to employees of a plant in Tennessee. Plaintiffs concede that the agreement is not applicable to employees in a company plant in Michigan, even though only a short distance outside of the city limits of Detroit. They concede that the agreement would not be applicable to employees in a new plant in Tennessee other than the Gemmer plant. We see no material distinction, with respect to geographical location, between a new plant in Tennessee and the relocation of the Gemmer plant in Tennessee. In both cases the plant, new or old, is not in the city limits of Detroit, as limited by the agreement. It is true, as the District Judge pointed out, that the plant in Tennessee has the same machinery and equipment, the same officers and supervisors, and the same operation, but, as also stated by him, it is in a "new climate," which of course recognizes that it is not in the city limits of Detroit, but in Tennessee. Whether it would be advisable or reasonable under the existing circumstances to have the agreement apply to the plant in Tennessee is not for the Court to decide. We must construe the contract as it is writen, rather than make a new contract for the parties. *Standard Oil Co.* v. *Ogden & Moffett Co.*, 242 F. (2) 287, 291-292, C. A. 6th; *Dura Electric Lamp Co.* v. *Westinghouse Electric Corp.*, 249 F. (2) 5, 7, C. A. 3rd; *Jenkins* v. *King*, 224 Ind. 164, 65 N. E. (2) 121, 163 A. L. R. 397; *Babcock Coal & Coke Co.*, v. *Brackens Creek Coal Land Co.*, 128 W. Va. 676, 37 S. E. (2) 519, 163 A. L. R. 871.

We are not in agreement with plainiffs' contention that the agreement was for the benefit of the employees of the Gemmer Company, wherever it might be, in Detroit or in Tennessee, and that the reference in the agreement to the city limits of Detroit was merely a reference to where

the Gemmer Company was then located. This ignores the fact that the reference is not to the employees of the Gemmer Company but to the Company's employees "in its plant or *plants*" within the city limits of Detroit. (Emphasis added.) The fact that the beneficiaries of the contract are specifically designated as the employees in all of the Company's plants within the city limits of Detroit instead of merely the employees of the Gemmer Company in Detroit makes it plain that the words were not used for the purpose of merely giving the present location of the Gemmer Company.

This argument is essentially the one upon which the Court of Appeals for the Second Circuit rested its decision in *Zdavok* v. *Glidden Co., supra.* But in that case there was a specific reference to one plant only, the address of which was specifically given, and there was no specific geographical limitation such as is contained in the agreement in the present case. In that respect the agreement in the *Glidden Company* case is materially different from the agreement in the present case, and in our opinion is not applicable on this phase of the case. In *Metal Polishers, etc.* v. *Viking Equipment Co.*, 278 F. (2) 142, C. A. 3rd, also relied upon by the plaintiffs, it appears that the new location of the plant involved was still within the geographical limits referred to in the collective bargaining agreement, which, of course, is vitally different from the situation which we are considering in the present case.

Nor do we think there is merit in the contention that plaintiffs' seniority rights at the Detroit plant are "vested" rights, which cannot be cut off or defeated by the relocation of the plant in Tennessee. The argument is based upon the theory that through years of employment at the Gemmer plant they have "earned" such seniority rights in accordance with the terms of the agreement, which cannot be cancelled or taken from them by unilateral action on the part of the defendant, at least during the life of the bar-

gaining agreement. Whether such rights continue in existence beyond the end of the current bargaining agreement is another question, which we are not now considering. Clearly, the word "vested" is not the correct word to describe these rights, in that there are a number of ways in which such rights may be terminated or lost. Section 31 of the bargaining agreement provides for loss of seniority rights for any one of nine separate reasons, including quitting work or being discharged and not being reinstated through the grievance procedure. If an employee should die, his "earned" seniority rights becomes worthless and are not enforceable rights against the employer. If the company discontinues in business and terminates its operations, the employees' seniority rights are terminated. *Local Lodge, 2040, etc.* v. *Servel, Inc.*, 268 F. (2) 692, 697-699, C. A. 7th. It appears to be well settled that such rights of the individual employees can be bargained away by the Union representing them in collective bargaining. *Elder* v. *N. Y. Central R. Co.*, 152 F. (2) 361, C. A. 6th; *System Federation No. 59, etc.* v. *Louisiana & A. Ry. Co.*, 119 F. (2) 509, 515, C. A. 5th. It was so recognized in *Zdanok* v. *Glidden Co., supra*, 288 F. (2) 99, 103 C. A. 2nd.

Accordingly, we do not have the question of whether plaintiffs' "vested" rights can be validly terminated by relocation of the plant in Tennessee. Rather, it is the question of what rights, if any, the plaintiffs have under the express provisions of the bargaining agreement upon the relocation of the plant in Tennessee. If no rights were acquired under the bargaining agreement as employees at the Tennessee plant, it necessarily follows that no rights have been cut off. If the 1958 bargaining agreement bargained away the employees' seniority rights which they had at the Detroit plant in the event they sought employment at a company plant in any city other than Detroit, they lost their rights through operation of the contract. *Elder* v. *N. Y. Central R. Co., supra*, 152 F. (2) 361, C. A.

6th; *System Federation No. 59, etc.* v. *Louisiana & A. Ry. Co., supra*, 119 F. (2) 509, 515, C. A. 5th. As heretofore pointed out, the only question which we have is what is the proper construction to be given to the 1958 agreement between the parties. Under our construction of the agreement the employees acquired no seniority rights under the 1958 agreement as employees at the Tennessee plant. Since no rights were acquired, we do not reach the question of any rights being cut off by unilateral action on the part of the defendant, either during the existence of the bargaining agreement or after its expiration.

The construction which we are presently giving to the collective bargaining agreement appears to be in accord with the construction also given to it by the Union until shortly before the filing of this action. In August 1947 Gemmer Manufacturing Company, predecessor of the Gemmer Company herein, entered into a collective bargaining agreement with the Union, in the preamble of which the address of Gemmer Manufacturing Company was given as 6400 Mt. Elliott Avenue, Detroit, Michigan. The recognition clause recognized the Union as the exclusive representative of its employees without any other designation or limitation of geographical area. The company maintained an experimental plant on Nine Mile Road just outside the city limits of Detroit. In the 1951 negotiations the Union, apparently recognizing that the 6400 Mt. Elliott Avenue address of the company in the 1947 agreement made it inapplicable to the experimental plant, and wishing to include the experimental plant in the 1951 agreement, proposed to delete the 6400 Mt. Elliott Avenue address from the preamble of the agreement and to change the wording of the paragraph dealing with recognition of the Union so as to make the agreement apply to all employees of Gemmer Manufacturing Company in the greater Detroit area. The company rejected this proposal but did change the wording of the recognition clause so as

to apply to its employees in "its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit."

This same language was again used in the bargaining agreement executed September 1, 1955, and expiring June 1, 1958. During the term of the 1955-1958 bargaining agreement Gemmer Manufacturing Company was acquired by the defendant.

In the negotiations leading up to the 1958 bargaining agreement the Union again proposed that the recognition clause be changed so as to apply to the Company's employees in the greater Detroit area, not restricted to the city limits. It also submitted a proposal that in the event the company moved its operations to other locations, the Union would be recognized for the purpose of collective bargaining on the matters of wages, hours and conditions of employment and that certain problems involved, including moving costs and seniority transfers, be subject to negotiations. These proposals were rejected and the language in the 1955 agreement was again used.

It will be noticed that following the first notice to employees on January 13, 1961, about the new Tennessee division, the Union in its letter of January 25, 1961, to the Company made no claim of seniority rights with respect to employment at the Tennessee plant under the 1958 agreement. It merely requested that any employee affected because of the transfer of a job be given an opportunity to go to Lebanon with the job and stated, "We feel you will agree that the long service given by an employee to the Company should be allowed to continue if he is willing to follow the operation to the new company location." It was not until May 9, 1961, following the decision in *Zdanok* v. *Glidden Co., supra,* on March 28, 1961, that the Union changed its "request" into a claim that such rights existed under the ruling in that case. This clearly seems to be a new and different construction of the agreement from that

given by the Union to the agreement before this case was decided.

One of the fundamental rules in the construction of contracts is for the court to give great weight to the construction which the parties themselves have given to the contract as shown by their actions thereunder. *Reynolds Metals Co.* v. *Skinner,* 166 F. (2) 66, 71, C. A. 6th, cert. denied, 334 U. S. 858; *Begnaud* v. *White,* 170 F. (2) 323, 325-326, C. A. 6th.

The judgment of the District Court is reversed and the case remanded to the District Court with instructions to enter a judgment declaring the rights of the parties in accordance with the views expressed herein.